In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 577

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The questions presented by the cross-petition are entirely independent of those presented in the Government's petition (No. 573). The two questions relating to the amount of compensation would not be reached unless the Court should first affirm the judgment of the court of appeals on both questions presented by the Government, and cross-petitioner's third question goes only to the timeliness of the appeal to the court of appeals and not to the merits. The presence before it of the additional questions presented by the cross-petition would not, therefore, aid the Court in its consideration of the questions presented

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in the Government's petition. The questions presented by the cross-petition must accordingly be viewed independently of those presented in No. 573, and, so viewed, they are clearly not of sufficient importance to require review by this Court.

1. The contention that the Government appealed from the wrong judgment is without substance. The cases relied on by cross-petitioner are those where two distinct parts of a case were separated for independent adjudication, with only one aspect of the case being initially disposed of and the other being left for later determination.[1] In this case, the first judgment

[1] In *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, the respondent petitioned the court of appeals to set aside Part III of a three-part FTC order; and the FTC cross-petitioned for enforcement of the whole order. The court entered an order reversing Part III but taking no action on Parts I and II. After the time for rehearing expired, the FTC filed a memorandum asking that an order be entered enforcing Parts I and II, but seeking no modification of the judgment reversing Part III. The court then entered a decree enforcing Parts I and II and reiterating the former reversal of Part III. This Court dismissed as untimely a petition for certiorari, challenging only the reversal of Part III, which was filed more than 90 days after the first judgment but within 90 days of the second.

In *Delta Drilling Co.* v. *Arnett*, 186 F. 2d 481 (C.A. 6), the district court entered a judgment quieting title in the plaintiff and directing an accounting by the defendants for their wrongful possession. Thereafter a judgment for damages was entered on the accounting. It was held that an appeal from the second judgment did not reopen the question of title. In *Durkin* v. *Mason & Dixon Lines*, 202 F. 2d 425 (C.A. 6), the district court entered an order, in a suit for overtime pay, dismissing the claim as to the first part of the period and granting recovery for the balance of the period, the amount of recovery to be determined on the basis of a stipulation. Thereafter a second order was entered fixing the

purported to dispose of the whole controversy as a single unit, leaving nothing undecided. Thereafter, upon timely motions to set aside or amend the judgment, the court entered an "Amended Judgment" granting cross-petitioner a much larger recovery than had the original judgment. The second judgment, rather than determining separate issues reserved by the first judgment, redetermined the very matters on which the first judgment was entered. It nullified and entirely displaced the original judgment, becoming the only judgment in existence that could be appealed from. Thus at no point in the proceedings were any of the issues treated as separable from any other and no judgment of any kind was ever entered which purported to be less than a single complete disposition of the entire case.

2. The issue of "additur" in this case is not at all the same as that involved in *United States* v. *Kennesaw Mountain Battlefield Ass'n*, 99 F. 2d 830 (C.A. 5), certiorari denied, 306 U.S. 646, alleged to be in conflict. In that case, the district court had entered an order granting the condemnee's motion for a new trial *unless* the Government agreed to an increase in the amount of compensation over the jury's verdict, which the Government did. The court of appeals upheld the additur, reasoning that (a) the condemnee could not complain since the additur gave him more than he was entitled to (there having been no error *requiring* a new trial); and (b) the Government could

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amount of recovery for the later period. An appeal challenging only the dismissal of the claim as to the first part of the period, taken from the second order, was held untimely.

not complain since it had consented to the additur. Here, however, rather than ordering a new trial conditioned upon the failure of the Government to agree to an additur, the district court simply determined the amount of compensation it deemed appropriate and entered a judgment displacing the jury's verdict. Such an asserted power in the court to decide the amount of compensation for itself has nothing to do with the traditional concepts of additur or remittitur, which are based simply on the theory that an order which gives to one party more than he is entitled to and to which the other party consents infringes the rights of neither. The order here amounts to neither more nor less than the determination of the amount of compensation by the judge rather than by the jury, and under no rationale can it be made consistent with the Government's admitted right, under Rule 71A of the Federal Rules of Civil Procedure, to have the issue tried to the jury.

This case, therefore, is not only not in conflict with *Kennesaw* but affords no basis for a decision of the question presented in that case, *i. e.*, whether the decision in *Dimick* v. *Schiedt*, 293 U.S. 474, applies to condemnation cases. The Court held in *Dimick* that even *conditional* additur orders violated the right of jury trial as guaranteed by the Seventh Amendment. To the extent that that decision was based upon the common law rules by which the constitutional right of jury trial is peculiarly bounded, it may be, as held in *Kennesaw*, that the right of jury trial springing from other sources has a different scope and would not necessarily be infringed by a conditional

additur. That is not the question here, however, and the right of jury trial given by Rule 71A would have to be given a very narrow scope indeed in order not to be infringed by the action of the district court here in deciding *unconditionally* the amount of compensation to be awarded.

3. Cross-petitioner's final argument is, in substance, that the district court should have directed the jury to return a verdict of no less than $142,000—the minimum valuation testified to by the witnesses adopting its theory of valuation—and, upon the jury's failure to do so, should have entered judgment notwithstanding the verdict for that amount. Clearly, however, the jury is entitled to make its own judgment on questions of valuation, and the testimony of expert witnesses need not be accepted "even if such testimony be uncontradicted." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627–628; *Burnett* v. *Central Nebraska P. P. & Irr. District*, 125 F. 2d 836, 837–838 (C. A. 8); *Staudenmaier* v. *Johnson*, 117 F. 2d 397 (C. A. 7).

United States v. *Grenais*, 172 F. 2d 507 (C.A. 4), certiorari denied, 337 U.S. 918, relied upon by cross-petitioner, is not in point. That was an action by the Government to recover double damages plus statutory forfeitures for fraudulent claims made against it by a contractor. There was no dispute over the amount of the claims alleged to have been fraudulently made, and the sole issue of fact was whether they were fraudulent or not. The jury held the defendants not guilty. The court of appeals, finding the evidence of fraud to have been overwhelming,

directed entry of judgment against the defendants notwithstanding the verdict. The court determined the amount of the damages by simply applying the statutory formula to the undisputed facts (*i. e.*, double the amount of the false claims plus the prescribed forfeitures). Indeed, it does not appear from the court's opinion that the defendants even contended that a trial was required on the issue of damages.

Respectfully submitted,

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